IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 69-5

D. H. OVERMYER CO., INC., OF OHIO
and
D. H. OVERMYER CO., INC., OF KENTUCKY, *Petitioners*
v.
FRICK COMPANY, a Pennsylvania Corporation,
Respondent

On Certiorari to the Court of Appeals, Lucas County, Ohio

BRIEF FOR PETITIONERS

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OPINIONS BELOW

There is no report of the 3-sentence opinion by the Ohio Court of Appeals. A copy is set forth in the form of a Journal Entry reproduced in the Appendix (App. 21-22). The Ohio Supreme Court did not write an opinion, but dismissed the Appeal *sua sponte* on the ground that, "no substantial constitutional question exists herein." (App. 24).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S. Code, Sec. 1257(3). Certiorari was granted March 29, 1971, and the time for filing this brief has been enlarged by the Court to July 27, 1971.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment Fourteen, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code, 2323.13:

> "(A) An attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession, which shall be in the county where the maker or any one of several makers resides or in the county where the maker or any one of several makers signed the warrant of attorney authorizing confession of judgment, any agreement to the contrary notwithstanding; and the original or a copy of the warrant shall be filed with the clerk.
>
> "(B) The attorney who represents the judgment creditor shall include in the petition a statement setting forth to the best of his knowledge the last known address of the defendant.

"(C) Immediately upon entering any such judgment the court shall notify the defendant of the entry of the judgment by personal service or by registered or certified mail mailed to him at the address set forth in the petition."

QUESTIONS PRESENTED

1. Does federal constitutional due process require notice and opportunity for hearing before entry of judgment? or may one party force the other in advance to surrender the constitutional right to notice and hearing as part of the consideration for the contract?

2. May State law authorize entry of judgment without notice to defendant, if it affords a subsequent hearing upon proof by the defendant that he has a meritorious defense?

3. May State law shift the burden of proof to the defendant in a civil action where judgment has been rendered without notice on warrant of attorney to confess?

STATEMENT OF THE CASE

Petitioners purchased from respondent a complete automatic refrigeration system to be installed by respondent in petitioner's warehouse in Toledo, Ohio, at a cost of $223,000. Payment was made in cash of some $92,000 and the execution of a promissory note in the amount of $130,977, due in twenty-one equal monthly installments with add-on interest (App. 6).

When the balance due had been reduced by approximately fifty per cent, to $62,370, the refrigerating plant failed completely to function. The warehouse sustained a loss of various foods in storage and the

entire cooling system had to be revised and renewed at very great cost to petitioners. Although the specifications called for automatic operation of the plant, respondent's failure to furnish a workable installation required petitioners to employ personnel to attend, maintain, and control the system at all times (App. 14-18).

While petitioners notified respondent of the need for repairs and modifications to comply with the contract and respondent's warranty, respondent refused and failed to take remedial measures, whereupon petitioner engaged others to do so (App. 16) and refused to make further payments as scheduled by the promissory note in question (App. 6). Respondent then proceeded to take judgment against petitioners in accordance with the so-called "cognovit" provision thereof (App. 7):

> The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this (sic) issuance and service of process, and confess a judgment against the undersigned in favor of the Holder of this Note, for the principal of this Note plus interest if the undersigned defaults in any payment of principal and interest
> * * *

An Ohio attorney, wholly unknown to petitioners, appeared and confessed judgment in favor of respondent for the sum of $62,370, plus interest and costs (App. 8). Neither process nor notice was given petitioners as to the commencement of suit or the designation of counsel for petitioners. Such counsel for petitioners did not communicate with his clients, did not inquire as to the existence of any possible defenses

or matter of reduction, offset, or counterclaim (App. 12-13). The only notice ever given petitioners was after the entry of judgment (App. 10).

Petitioners forthwith moved for new trial and to vacate judgment, setting forth by affidavits the lack of notice in entering judgment (App. 13), the collapse of the equipment, the damages and great cost of replacement, and sought to defend the action on the note by showing a failure of consideration and breach of contract by respondent (App. 12-19). A sworn answer accompanied the motion to vacate, showing the meritorious defense which was well known to respondent at the time it took the judgment (App. 13). Petitioners' motions were overruled and the Court confirmed its prior order for execution and discovery in aid thereof. (App. 20). Petitioners specifically asserted on appeal [Assignment of Error No. 2] a denial of due process by entry of judgment without notice and opportunity for hearing, and without possibility of presenting meritorious defenses (App. 21). Without discussion, the Court of Appeals held:

> the trial court, **with no abuse of discretion,** properly overruled the defendants-appellants motion to vacate the judgment. (Emphasis added).

The judgment was affirmed and the case remanded. (App. 21).

By appeal to the Supreme Court of Ohio, petitioners alleged denial of the federal constitutional right to due process of law by virtue of the entry of judgment without notice, and in the refusal to consider for trial a valid defense promptly tendered by petitioners after receiving notice of the judgment (App. 23). The Supreme Court of Ohio wrote no opinion, but or-

dered on its printed form, "The Court *sua sponte* dismisses the appeal for the reason that no substantial constitutional question exists herein." (App. 24). Thereafter this Court granted petitioners' application for certiorari to review the constitutional questions discussed herein.

SUMMARY OF ARGUMENT

There was neither service of process nor voluntary appearance by or for the defendants. The trial court therefore had no personal jurisdiction over petitioners.

The Ohio statute is unconstitutional as authorizing entry of judgment without notice and an opportunity to be heard.

No waiver of those constitutional rights by contract can be attributed to petitioners, because they couldn't know what defenses they would have in the future. Public policy militates against agreements to give up basic, fundamental rights and oust the courts of jurisdiction.

ARGUMENT

I. THE JUDGMENT BELOW IS INVALID UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT [1]

(A) There Is No Personal Jurisdiction Over the Defendant.

(1) There Was No Personal Service

In every concept of a valid judgment against a particular defendant there must be jurisdiction over the defendant *in personam*. Such jurisdiction is an exer-

[1] While this case involves the law of Ohio, there are others either on the docket of this Court, or moving through the lower courts, all involving the same questions. The legislation ranges from statutory approval to prohibition of the use of cognovits as a crime in several States. A resumé of the State laws is appended to this Brief as an Appendix.

tion of the court's authority over the defendant in a manner prescribed by law to bring the party into court. This is accomplished in one of two procedures: there must be either a service of process demanding that the party named appear and state his defense, or that party must make a voluntary appearance. Such is the law of the State of Ohio just as much as other States of the Union, and the State Supreme Court has reversed judgments on the ground that no jurisdiction had been obtained over the person of the defendants in the absence of service of process. *Baltimore & Ohio R. Co.* v. *Goodman*, 57 Ohio St. 641, 50 N.E. 1132 (1897); *Cleveland Leader Printing Co.* v. *Green*, 52 Ohio St. 487, 40 N.E. 201 (1895). In *Terry* v. *Claypool*, 77 Ohio App. 77, 65 N.E. 2d 883 (1945), the court expressly ruled there can be no valid judgment in personam unless the court has acquired jurisdiction over the person of the defendant either by service of process, or by his voluntary appearance. So says *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 418 (1957).

This Court has fully recognized the rule in *Pennoyer* v. *Neff*, 95 U.S. 714, 732 (1877), and in the clearest terms reversed the judgment for want of jurisdiction, laying down fundamental rules in *McDonald* v. *Mabee*, 243 U.S. 90, 91 (1917):

> "The foundation of jurisdiction is physical power . . . . although submission to the jurisdiction by appearance may take the place of service upon the person . . . . Subject to its conception of sovereignty even the common law required a judgment not to be contrary to natural justice . . . . And in States bound together by a Constitution and subject to the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by pretty close adhesion to fact."

In *Turner* v. *Sawyer*, 150 U.S. 578, 583 (1893), the Court expressly set forth that there are only two ways a court can acquire personal jurisdiction over the person of a defendant to render a valid personal judgment: (1) by service of process whereby the defendant is brought into court against his will, or (2) by his own *voluntary* appearance and submission to the court's authority. *Accord: Mexican C. R. Co.* v. *Pinkney*, 149 U.S. 194, 200 (1893). Ohio law is the same: jurisdiction of the person may be obtained only by service of process, or by voluntary appearance. *Sears* v. *Weimer*, 10 Ohio Supp. 1 (1942), *affirmed*, 143 Ohio St. 312, 55 N.E. 2d 413 (1944).

On the same basis it is held that if the defendant is not served with process, or if the process be defective, "his voluntary appearance is essential in order that a valid personal judgment may be rendered against him." *Goldey* v. *Morning News*, 156 U.S. 518, 521 (1895).

In the case at bar the judgment admittedly is not rested upon service of any kind. None was issued.

(2) There Was No Appearance for Petitioners

The judgment rests solely upon appearance by an attorney, wholly unknown to petitioners, employed, paid and directed by respondent (plaintiff below), which attorney never communicated with petitioners (defendants), but waived issuance and service of process, and with knowledge of the facts, confessed, judgment for the amount demanded by plaintiff. Clearly this appearance is a violation of a proper attorney-client relationship, of the canons of legal ethics, and of basic standards of elementary fairness and common honesty. It is an utter nullity and does

not comport with this Court's standards to confer jurisdiction on the trial court.

It is axiomatic that "appearance" is an overt act by which a party comes into court and submits himself to its jurisdiction, and it is his first act therein. *Sharp* v. *Sharp,* 196 Kan. 38, 409 P. 2d 1019 (1966); *In re Samuelson,* 134 N.J.L. 573, 49 A. 2d 479 (1946); *Case* v. *Case,* 124 N.E. 2d 856, 860 (Ohio Prob. 1955); *McLaughlin* v. *Chicago, M., St. P. & P. R. Co.,* 23 Wis. 2d 592, 127 N.W. 2d 813 (1964); *Sands* v. *Lefcourt Realty Corp.,* 117 A. 2d 365 (Del. 1955).

It is clear that such acts of submission to the court's authority must be "voluntary", as this Court plainly said in *Pennoyer* v. *Neff, supra,* at p. 732, quoted and followed in *Wilson* v. *Seligman,* 144 U.S. 41, 44-45 (1892):

> "To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or *by his voluntary appearance.*" (Emphasis added).

Whether or not an appearance is voluntary is obviously a matter depending upon the party's state of mind at the time of the appearance, not at some long prior date when the contract was signed. This question of volition is one an attorney cannot resolve without talking with his client, an event which did not take place between petitioners and the attorney who appeared for them. A similar question was raised in *Osborn* v. *Bank of United States,* 9 Wheat. 738,

829-31 (1824), where Chief Justice John Marshall noted that attorneys as members of the bar are presumably duly authorized to appear for their clients and need not make their authority a matter of record. If such authority should be required, it may be supplied as a matter of form.

> "It is admitted that a corporation can only appear by attorney, and it is also admitted, that the attorney must receive the authority of the corporation to enable him to represent it."

Nothing could be clearer than the rule that an unauthorized appearance does not confer jurisdiction. *Lucas* v. *Vulcan Iron Works,* 233 Fed. 823, 827 (M.D. Pa. 1961); *Ex parte Forbell,* 82 N.Y.S. 2d 109 (1948). Thus an attorney holding a general retainer for a corporation is unauthorized, without specific direction, to enter his client's appearance in a suit, and the client is not bound by the judgment. *King Construction Co.* v. *Mary Helen Coal Corp.,* 194 Ky. 435, 239 S.W. 799 (1922). The unauthorized attorney's acts are a nullity. *Gray* v. *First National Bank,* 388 Ill. 124, 57 N.E. 2d 363, 365-6 (1944). Similarly, an unauthorized suit to foreclose a mortgage, without the client's knowledge or consent does not give the court jurisdiction. *Courtney* v. *Campbell,* 143 Okl. 5, 286 Pac. 872 (1930). Likewise, a judgment against a defendant who was never served with process, and whose appearance was entered by an attorney without his knowledge or consent, would not be enforced. *Mills* v. *Scott,* 43 Fed. 452, 455 (S.D. Ga. 1890).

Recognizing the complete incapacity of counsel to act without express authority as a *sine qua non,* the Third Circuit carefully inquired and found the ap-

pearance in question to have been authorized in *Paradise* v. *Vogt Landische Maschinen-Fabrik,* 99 F. 2d 53, 55 (3d Cir. 1938).

In order to implement and emphasize the "voluntary" aspect of court appearances as submission to the judicial authority, it is plain that validity of an appearance depends wholly upon the party's intention. *Salmon Falls Mfg. Co.* v. *Midland Tire & Rubber Co.,* 285 Fed. 214, 218 (6th Cir. 1922); *Grable* v. *Killits,* 282 Fed. 185, 195 (6th Cir. 1922) *cert. denied* 260 U.S. 735 (1922); *Dahlgren* v. *Pierce,* 263 Fed. 841, 846 (6th Cir. 1920). In this context, an attorney's written acceptance of notice that the other side had filed a brief did not constitute an "entry of appearance." *E. L. Rice & Co.* v. *Pike,* 117 Ohio St. 521, 160 N.E. 90 (1927). An oral agreement of counsel, out of court, to a setting of the case for trial, did not so recognize the jurisdiction of the court as to constitute an entry of appearance. *Templeman* v. *Hester,* 65 Ohio App. 62, 29 N.E. 2d 216, 218 (1940):

It appears to be well recognized that a voluntary appearance, to be effectual, must be made with knowledge that a suit is pending and with a full intention to appear therein. *Crary* v. *Barber,* 1 Colo. 172 (1869); *Merkle* v. *Rochester,* 13 Hun. 157 (N.Y. 1878); *Weaver* v. *Stone,* 2 Grant Cas. 422 (Pa. 1853). Following the Sixth Circuit cases noted above, all of which came up from Ohio, the federal court in Ohio has categorically announced that waiver of service by appearance is always a matter of intention, and is not to be inferred, except as the result of facts from which an intent may be properly inferred. *Durabilt Steel Locker Co.* v. *Berger Mfg. Co.,* 21 F. 2d 139, 140 (N.D. Ohio, 1927). *Accord: Rhodes* v. *Rhodes,* 3 Mich. App. 397, 142

N.W. 2d 508 (1966). In Ohio the rule finds ready application. The Supreme Court of the State has held the defendant makes no appearance when his attorney writes to plaintiff's attorney asking him to dismiss the suit for lack of jurisdiction, and sending an unsigned carbon to the court. Since he asked nothing of the court, but only of opponent's counsel, it is held he made no appearance. *Litsinger Sign Co.* v. *American Sign Co.*, 11 Ohio St. 2d. 1 227 N.E. 2d 609, 621 (1967). *Accord: Rutherford* v. *Bentz*, 345 Ill. App. 532, 104 N.E. 2d 343 (1952). As indicating the primary importance of the party's intent, it is held that actual physical presence of a party in the courtroom during some phase of the proceeding does not constitute an appearance. *Austin* v. *State ex rel. Herman*, 10 Ariz. App. 474, 459 P. 2d 753 (1969).

Study of these cases plainly shows that there can be no valid appearance for a defendant who has no knowledge of the pending suit, and who has not authorized the specific attorney to represent him.

(a) *An attorney may not, as a matter of law and legal ethics, without his client's knowledge, accept employment, compensation, and instructions in the same case from his client's adversary, and his actions in so doing are not to be regarded as those of his nominal client.*

Happily the literature of the law records very few cases of attorneys who have attempted to carry water on both shoulders, serving two masters. The courts have been completely intolerant of such conduct as a matter of public policy. In *State* v. *Union National Bank*, 145 Ind. 537, 44 N.E. 585, 587 (1896), the court considered a very close parallel to the case at

bar. The Bank sued to have a receiver appointed for one Patton who lived in Ohio, and who was not served with process. An answer was prepared *by plaintiff's counsel,* and signed by one Rankin, purporting to be bookkeeper and attorney for Patton, confessing the facts alleged in the complaint. The answer was filed in court *by plaintiff's counsel* with the complaint. In reversing the action below, the Indiana court quoted from and followed *Pressley* v. *Harrison,* 102 Ind. 41, 1 N.E. 188, 192 (1885):

> "One party to an adversary proceeding cannot do anything, nor can be authorized to do anything by the other, which can give the court or judge jurisdiction over him, except as the statute has enacted. As the statute does not authorize, and **public policy forbids,** one party to appear for the other, it must be held that *where it appears, as here, that the only jurisdiction which the court or judge had over the defendant was such as was acquired through the agency of the plaintiff in appearing for him, the proceeding was without jurisdiction and void.* (Emphasis supplied).

On a direct parallel with that case it was held that a power of attorney given to plaintiff's attorney by defendant, authorizing him to enter her appearance, is void as against the policy of the law. *Ball* v. *Poor,* 81 Ky. 26, 4 Ky. Law Rep. 746 (1883).

It can require no argument or voice of counsel to establish the rule that an attorney owes his client a unique obligation of single-minded loyalty. Innumerable cases recognize the duty of counsel to be mindful of possible conflicts, not alone in the clear where the clients are adversaries, but where they are co-defendants. *Glasser* v. *United States,* 315 U.S. 60, 76 (1942). The courts have spoken with a unanimous judgment

on the subject. *Wilson* v. *Phend*, 417 F. 2d 1197, 1199-1200 (7th Cir. 1969); *Woodruff* v. *Cook*, 310 F. Supp. 280, 287 (N.D. Miss. 1970); *United States ex rel. Taylor* v. *Rundle*, 305 F. Supp. 1036, 1039 (E.D. Pa. 1969).

Professional standards of conduct for attorneys leave no room for argument or doubt that the client's interest alone is, and always must be, his single guiding star. Canon No. 6, of the American Bar Association Canons of Professional Ethics, is crystal clear on this subject:

> **Adverse Influences and Conflicting Interests**
>
> "It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
>
> *"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.*
>
> *"The obligation to represent the client with undivided fidelity* and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." (Italics supplied).

It is plain that the attorney who entered an appearance for these petitioners was in no sense their attorney, but was only the agent and employee of respondent. He owed and recognized no obligation

of any kind, as attorney or otherwise, to petitioners. His actions were never those of petitioners, and were totally ineffective on any analysis to confer jurisdiction on the trial court.

(B) The Ohio Statute Authorizing Entry of Judgment Upon Warrant of Attorney, Without Notice to the Defendant or Opportunity To Be Heard, Is Unconstitutional for Want of Due Process of Law.

It is not open to doubt that the due process concept requires reasonable notice and opportunity to be heard. All parties concede this as fundamental. With extensive annotation this Court has very recently restated and applied this principle in invalidating a Connecticut statute. *Boddie* v. *Connecticut,* 401 U.S. 371, 378 (March 2, 1971).

For purposes of the case at bar the problem is not so much procedural due process as it is a question of how far persons may require others to waive basic constitutional rights, surrender fundamental freedoms.[2] The decisions below held that petitioners surrendered all right to notice and hearing in connection with payment for the respondent's performance—no matter how shoddy that performance, how shabby the equipment furnished, no matter how far that performance fell short of contract obligations. In spite of the constitutional protection, it is decided below that petitioners must pay the contract price for a contract that was never performed, and they gave up in advance,

[2] So much attention has been drawn to the constitutionality of cognovit obligations as a credit instrumentality, that the proliferating litigation has generated a variety of legal discussions on the subject. A bibliography has been added to this Brief as an Appendix.

it is said, all right to assert that non-performance as a defense in this action.

The issue is a narrow one: it relates only to contract waiver, before suit has been filed, before any dispute has arisen. It does not relate to judgments based on consent of the parties after suit and service (Ohio R.C. Sec. 2323.12) nor does it concern default judgments entered after proper notice to the party defendant. See *Boddie* v. *Connecticut, supra,* at 378. **This case pertains only to judgments entered on warrant of attorney embodied in the original contract, whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of his own choice.**

Such contracts oust the courts of jurisdiction, and set at naught the basic constitutional protections of a free society, leaving the weak to be prey to the strong, the small to be trod under heel by the great, and the poor to be eviscerated for the sake of the rich; all in direct defiance of the saving mandate of the Fourteenth Amendment.

By the law of Ohio the banks, manufacturers, contractors, large department stores, all who extend credit to others, may insist that the contract authorize the creditor to take judgment against the debtor for default in payment, without notice, without opportunity to be heard, without counsel, in disregard of any and every defense the debtor may have.[8] The court is authorized to vacate the judgment upon a showing by

[8] Ohio Revised Code, Sec. 2323.13, *supra,* p. 2. A 1970 amendment to this statute requires such documents to spell this out *in haec verba;* it is quoted herein at p. 23, *infra.*

the debtor that it has a "valid defense,"[4] but this is "discretionary" with the trial judge, and, as in the case at bar (App. 21-22), refusal will not be disturbed on appeal.

The judgment entered under this statute is not different in operation or effect from a judgment rendered after protracted trial. Execution is immediately available[5] and the mere existence of the judgment constitutes a lien on all real estate of the judgment debtor.[6] While the court has power to open the judgment upon a proper showing,[7] the matter is "discretionary," and, as in the case at bar, the court's refusal will ordinarily not be disturbed on appeal.[8] Petitioners claim this procedure is wholly lacking in due process of law under the Fourteenth Amendment.

In the light of this Court's continuing exposition of the due process clause of the Fourteenth Amendment, it cannot be doubted that minimal standards of notice and an opportunity to be heard are required before State action may affect a person's "life, liberty, or property." Long ago this Court reversed a State court decision for lack of due process in rendering judgment against a foreign corporation after service on a resident director. In *Riverside & D. R. Cotton Mills* v.

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[4] See note 7, *infra*.

[5] App. 20.

[6] Sec. 2329.02, Ohio Revised Code.

[7] The debtor must show grounds "sufficient in law to constitute a valid defense." *Bellows* v. *Bonlus*, 83 Ohio App. 90, 82 N.E. 2d 429, 430 (1948).

[8] App. 21.

Menefee, 237 U.S. 189, 193, 196 (1915), Chief Justice White wrote for the Court:

> (193) "That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but statement.
>
> (196) " . . . the very act of fixing by judicial action without a hearing a sum due, even though the method of execution be left open, would be, in and of itself a manifestation of power repugnant to the due process clause."

Extensive and learned treatises have been devoted to exposition of this concept. Virtually every term of this Court produces new and different challenges, but the old standards have great staying power. Thus, in *Goldberg* v. *Kelly,* 397 U.S. 254, 267-71 (1970), it was ruled that welfare recipients may not be deprived of their stipends without due process, spelling out the right to notice and an opportunity to be heard by the decisionmaker. This hearing must afford an opportunity to present evidence (pp. 267-68), to confront and cross-examine adverse witnesses (pp. 269-70), and to have the assistance of counsel if the party so chooses (pp. 270-71). Noting the procedure in the City of New York did not conform, this Court held:

> (p. 268) "These omissions are fatal to the constitutional adequacy of the procedures."

This Court long ago recognized the absolute right of a party in a fair hearing to introduce evidence. *Saunders* v. *Shaw,* 244 U.S. 317, 319 (1917). More recently, and with extensive review of authorities, this Court held unconstitutional a Connecticut statute conditioning access to the divorce courts upon payment of fees not available to women drawing public welfare

assistance, thereby denying fundamental constitutional rights of hearing guaranteed by the due process clause. *Boddie* v. *Connecticut*, 401 U.S. 371 (March 2, 1971).

The great landmarks of due process exposition chart a clear course for the present decision. Notice which is reasonable as to time must be afforded the defendant, *Roller* v. *Holly*, 176 U.S. 398, 413 (1900), and he must be given a meaningful opportunity to be heard. *Griffin* v. *Griffin*, 327 U.S. 220, 228 (1946); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *McDonald* v. *Mabee*, 243 U.S. 90, 92 (1917); *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1914); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914).

Let it not be suggested that the power of the court to reopen the judgment upon a proper showing supplies ex post facto the constitutional protections otherwise so obviously lacking. In *Griffin* v. *Griffin, supra*, a New York decree for alimony was denied full faith and credit in the District of Columbia for lack of due process in failing to accord the defendant proper notice and opportunity to be heard. It was contended that he could move to set the decree aside and thus secure a hearing. Chief Justice Stone spoke for the Court:

> (p. 231) "Due process forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights. . . . Even though petitioner could, if he knew of the judgment before execution is actually levied, move to set the judgment aside, that could not save the judgment from its due process infirmity, since it and the New York practice purport to authorize the levy of execution before petitioner is notified of the proceeding or the judgment."

Of course, the Court will note that opening the judgment requires a demonstration by the defendant that he has "a valid defense." *Bellows* v. *Bowlus, supra* (p. 17, note 7). This completely shifts the burden of proof to the defendant, a result that fails to conform to constitutional standards. In short, presentation of the defense is prejudiced by the existence of the unlawful judgment. The precise question was involved in *Armstrong* v. *Manzo,* 380 U.S. 545, 551 (1965), invalidating a judgment of adoption for failure to give notice to the natural father. He sought to have it set aside, and, upon a hearing, the trial court held he had failed to prove he had not forfeited the right to object, denying his motion to vacate the adoption decree.

This Court held (380 U.S. at 550) the failure to give advance notice to the father "violated the most rudimentary demands of due process of law." The analysis is precisely the same as that of petitioners herein.

As to the curative value of the subsequent hearing, that shifted the burden of proof to petitioner on issues which would have had to be proved by his opponent if proper advance notice had been given, and it could not be accepted as a substitute for an orderly hearing in advance of judgment. The rule is directly applicable to this case where the reopening of the judgment depends upon the proof furnished by the defendant. The Court said:

> (p. 551) "The burdens thus placed upon the petitioner were real, not purely theoretical. For 'it is plain that where the burden of proof lies may be decisive of the outcome.' *Speiser* v. *Randall,* 357 U.S. 513, 525. Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution."

It is considered that *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 339 (1969), is of controlling weight in this controversy. It was there held that a Wisconsin statute authorizing garnishment before judgment, without advance notice and hearing, was unconstitutional, even though the final decision was deferred to await trial.

> (p. 339) "But in the interim the wage earner is deprived of his employment of earned wages without any opportunity to be heard and to tender any defense he may have, whether it be fraud or otherwise."

Since garnishment without notice and hearing is condemned for lack of due process, then equally unconstitutional is judgment entered without such prerequisites for the immediate consequence of such judgment is execution, as in the case at bar (App. 20), by garnishment, attachment, and the fixing of liens on realty[9] —all deprivations of the kind condemned in *Sniadach*. Counsel for one of the largest finance companies fully admitted the perfect parallel in complete frankness:[10]

> In Wisconsin where . . . under the small loan law, judgments by confession are prohibited, garnishment procedure may proceed prior to judgment. It is doubtful therefore whether there is any real or practical difference . . . The guy's wages have been garnished without prior notice in either case!

It may be noted there was no difficulty about service on petitioners. The Petition on which the judgment in

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[9] Sec. 2329.02, Ohio Revised Code.

[10] Quoted in *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit.* Hopson, 29 Chi. L. Rev. 111, 121 (n. 63) 1961.

issue was rendered shows respondents knew the correct address of the resident petitioner in the City of Toledo, where the suit was filed. (App. 3). The only reason there was no service was that respondent well knew the action would be strongly defended, on meritorious grounds, and respondent wanted to cut off that defense. Obviously, the Ohio procedure is a prepotent device for securing a judgment, and collecting money without risking a defense. *Hadden* v. *Rumsey Products, Inc.*, 196 F. 2d 92, 96 (2d Cir. 1952); 31 Ohio Jur. 2d, *Judgments*, § 139 (1958). Perfectly sound is the comment that this procedure "is the loosest way of binding a man's property that was ever devised in any civilized country." *Alderman, Bateman & Bateman* v. *Diament*, 7 N. J. L. 197, 198 (1824).

It seems clear that when a party causes the entry of judgment by concealing from the court the fact that the defendant has a good faith defense the procedure smacks of fraud, and the court itself is being used as an instrument of that fraud. *Cf. Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 423 (1914). But such is not the law of Ohio[11]—witness the recent legislative change following the filing of this case in this Court, and contemporaneous judicial condemnations of the practice, *e. g. Swarb* v. *Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970). Responding to the plainly justified complaint that many cognovit provisions are not understood, it is now required[12] that the instrument containing the warrant of attorney to confess judgment include the following in such type size or distinctive marking that it

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[11] *Hadden* v. *Rumsey Products, Inc., supra*, at p. 96.

[12] Amended Substitute Senate Bill No. 85, Approved June 17, 1970, effective September 16, 1970, amending Ohio Revised Code 2323.13.

appears more clearly and conspiciously than anything else on the document:

> "Warning—By Signing This Paper You Give Up Your Right to Notice and Court Trial. If You Do Not Pay on Time A Court Judgment May Be Taken Against You Without Your Prior Knowledge and the Powers of A Court Can Be Used to Collect From You or Your Employer *Regardless of Any Claims You May Have Against the Creditor Whether for Returned Goods, Faulty Goods, Failure on His Part to Comply with the Agreement, or Any Other Cause.*" (emphasis added).

There is no change in the law—the statute requires only that the consequences of the contract be made crystal clear to all who sign such an agreement: **"Judgment May Be Taken Against You Without Your Prior Knowledge."** Could there possibly be more of an annulment of the due process clause? And the *Sniadach Case* is not to be followed, for when this judgment is taken without your prior knowledge—"The Powers of A Court Can Be Used to Collect From you or Your Employer." All this without notice or opportunity to be heard. These are all being waived. But there is more! The signer is giving up any right to complain about a breach of contract, to credit for goods he has returned, for faulty goods. This is all but a waiver of citizenship!

As noted above, it is not a change in the law; merely a legislative exposition of the consequences of the cognovit contract. It seems to represent the strongest kind of argument for unconstitutionality of the clause.

(1) The Signing of a Cognovit Note Authorizing a Confession of Judgment is not an Advance Waiver of Due Process Rights to Notice and an Opportunity to be Heard.

Those who would defend the judgment below claim that petitioners waived the constitutional right to due process notice and opportunity to be heard. This seems to push too hard for the result desired, without regard to the true nature of a lawful waiver. It is elementary that waiver is "the intentional or voluntary relinquishment of a known right."[13] The authorities are unanimous that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938). The rule applies as well to civil matters as to criminal. For example, this Court said clearly in *Ohio Bell Tel. Co.* v. *Public Utilities Comm.,* 301 U.S. 292, 307 (1937): "We do not presume acquiescence in the loss of fundamental rights." The same doctrine was announced and followed in *Aetna Insurance Co.* v. *Kennedy,* 301 U.S. 389, 393 (1937).

If a waiver must be an intentional and voluntary relinquishment of known rights, it seems plain there can be no waiver before those rights are accrued and identifiable. Can it truly and fairly be said that the signer of a cognovit note surrendered all right to insist upon performance of the contract by the other party? Would he give up all right to complain for a breach? or to set off expenses of remedying such breach? to complain of fraud? or late performance? or deviations from important contract specifications? or failure to comply with local law and ordinances? Obviously these decisions cannot be made until a dispute has

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[13] Black's Law Dictionary (4th ed. 1962); *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938); *Brookhart* v. *Janis,* 384 U.S. 1, 4 (1966).

arisen. Let there be no doubt petitioners recognize any man's right to waive another's default, to make equitable adjustments, to compose differences. But such waiver of rights can occur only when there has been a legal wrong, brought to the party's knowledge, and he then and there *intentionally* and *voluntarily,* for reasons sufficient at the time, decides to forego his known rights. If this analysis makes sense at all, the cognovit provision cannot be fairly construed to embrace relinquishment of rights which are unknown and unknowable at the time of contracting.

Presumably both parties intend to perform as required. The one who is receiving financial credit in the transaction fully intends to make payment, and he may, out of long custom, in accord with the universal practice in Ohio, sign a cognovit note. The limitations of this clause are perfectly plain and sensible: if the other party fully performs his contract and payment is not made as promised, he may enter judgment without notice. The debtor does not agree to the entry of judgment if there is no performance by the other party; or if that performance is so short of contract requirements that he has to engage others to remedy the defects and omissions. The waiver is clearly to be limited by, and conditioned upon, a proper and complete performance by the other party, nothing less.

On the other hand consider the Ohio Statute, the old § 2323.13 Ohio Revised Code, (p. 2, *supra*) and the amended form quoted above, (p. 23) both sanctioning a complete surrender of all contract rights.

Suppose respondent had written into the contract with petitioners a provision reciting that if the equipment should break down or fail to conform to specifications, petitioners agree never to bring court action for

damage; and if respondent should sue for any part of the purchase price unpaid, petitioners agree they shall have no notice or opportunity to be heard; and they waive the right to counsel of their own choice, but agree to let respondents select counsel for them, and authorize him to confess judgment for any amount demanded by respondent; waiving all right to produce evidence in their own defense, and surrendering the rights to confront and cross examine witnesses against them. Such an agreement should peremptorily call down the condemnation of this Court as a denial of fundamental freedoms guaranteed by the due process clause of the Fourteenth Amendment. *Goldberg* v. *Kelly, supra.*

The creditor would claim a waiver of those rights by contract. In the case at bar, however, the action complained of is the rendering of the judgment in conformity with the Ohio statute. It is thus clearly state action which must conform to the Fourteenth Amendment. *NAACP* v. *Alabama,* 377 U.S. 288 (1964); *Barrows* v. *Jackson,* 346 U.S. 249 (1952).

Recognizing the time of the alleged waiver as antecedent to all disputes between the parties, it is plain that petitioners would not voluntarily, intentionally and knowingly waive their right to defend upon a meritorious basis respondent's claims for payment. As a matter of policy it seems the court should refuse to enforce such thorough-going subversion of contract principles of right and fair-dealing.

Even more, it may be noted that the cognovit provision here in issue leaves the court no judicial function, but completely ousts it of jurisdiction. The court has no authority to inquire into the merits of the case, the volition of the parties in executing the contract, or

any other factor. It may only render judgment, even without inquiry as to the evidence to support the amount due. This has been roundly and soundly condemned because it reduces the judiciary to a mere clerical functionary, performing only ministerial functions in accordance with *ex parte* demands of the plaintiff. *First National Bank of Kansas City* v. *White,* 220 Mo. 717, 722, 120 S.W. 36, 42 (1909). Such ousters of judicial jurisdiction are considered contrary to public policy and not to be enforced. *Carbon Black Export, Inc.* v. *SS Monroza,* 254 F. 2d 297, 300-01 (5th Cir. 1958); *Gatliff Coal* v. *Cox,* 142 F. 2nd 876, 881 (6th Cir. 1944); *Cf. Swift & Co.* v. *Hocking Valley R. Co.,* 243 U.S. 281, 289 (1917).

Many cases may be found to limit contract provisions by which a party is forced to surrender various legal and constitutional rights. Such surrenders made in the face of litigation are clearly within a party's right, once he knows the problem and can appraise the alternatives. Petitioners especially urge that these legal and constitutional rights cannot be waived in advance as a condition of contracting. This Court invalidated a Wisconsin statute in *Insurance Company* v. *Morse,* 87 U.S. 445, 451 (1874), whereby insurers were required to agree, upon qualifying in Wisconsin, that they would not remove any suit to a federal court. The court recognized the choice of a party to waive rights, to consent to special procedures in each case as presented, but the *advance surrender* was held unlawful:

> (p. 451) A man may not barter away his life or his freedom, or his substantial rights . . . in these aspects any citizen may no doubt waive the rights to which he may be entitled. *He cannot, however,*

bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions whenever the case may be presented.

That the agreement of the insurance company is invalid upon the principles mentioned numerous cases may be cited to prove. (citations omitted) *They show that agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.* (italics supplied)

The same rule has been announced and followed by the Supreme Court of Ohio in *Myers* v. *Jenkins,* 63 Ohio St. 101, 120, 57 N.E. 1089, 1093 (1900), where an insurance contract required adjustment of claims through the company alone and without resort to the courts.

This was held to be void and of no effect. The court recognized that a party whose rights have accrued may waive those rights or arbitrate.

"But a party cannot bind himself by contract in advance to renounce his right to appeal to the courts for the redress of wrongs . . . Courts are always open for the redress of wrongs and no person can, by contract in advance, deprive himself of the right to appeal to them."

A fair evaluation of the cognovit clause does not warrant the conclusion that the signer has waived all constitutional rights to "his day in court" under the due process clause of the Fourteenth Amendment, to notice and opportunity to be heard, to defend against unjustified claims, to be represented by counsel of his own choice, to produce evidence in his own defense, to confront and cross examine witnesses against him, and to have an impartial decisionmaker evaluate the rec-

ord and recide between the parties. These are rights too precious to be stripped out of contract relationships except under the most special circumstances. They represent basic rights guaranteed by the Constitution, and this Court should preserve them against State laws which would destroy their vitality. *Goldberg* v. *Kelly, supra,* 267-71.

Charles Dickens in 1837 wrote about Mrs. Bardell and her suit for breach of promise to marry, where her attorneys induced her to sign a cognovit for costs, which led to her being jailed without notice or opportunity to be heard. It may have been a commonplace at that time, but there was no Fourteenth Amendmena. Even so it was held in low repute.[14]

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[14] *Pickwick Papers,* Ch. 47:

"Now, Lowten," said little Mr. Perker, shutting the door, "what's the matter? No important letter come in a parcel, is there?"

"No, sir," replied Lowten. "This is a messenger from Mr. Pickwick, sir."

"From Pickwick, eh?" said the little man, turning quickly to Job. "Well, what is it?"

"Dodson and Fogg have taken Mrs. Bardell in execution for her costs, sir," said Job.

"No!" exclaimed Perker, putting his hands in his pockets and reclining against the sideboard.

"Yes," said Job. "It seems they got a cognovit out of her for the amount of 'em, directly after the trial."

"By Jove!" said Perker, taking both hands out of his pockets, and striking the knuckles of his right against the palm of his left emphatically. "Those are the cleverest scamps I ever had anything to do with!"

"The sharpest practitioners I ever knew, sir," observed Lowten.

"Sharp!" echoed Perker. "There's no knowing where to have them."

CONCLUSION

In the absence of personal service, and without an authorized appearance for petitioners, the judgment of the Court of Common Pleas was rendered against petitioners in violation of the due process clause of the Fourteenth Amendment, since the court lacked jurisdiction *in personam*. The Ohio Statute is therefore unconstitutional as a violation of the due process clause in sanctioning judgment without notice or opportunity for hearing.

The mere signature on a cognovit contract clause in advance of any dispute, cannot fairly be construed to import a waiver of basic constitutional rights under the due process clause.

It is concluded the judgment below is without lawful foundation, and petitioners pray the Court to reverse and remand the cause with appropriate directions.

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APPENDICES

(1) Bibliography of Law Review Literature:

Agler, Note, *Confession of Judgment—Refusal of New York State To Enforce Pennsylvania Cognovit Judgments.* 74 Dickinson L. Rev. 750 (1970)

Comment: *Cognovit Judgments: Some Constitutional Considerations.* 70 Columbia L. Rev. 1118 (1970)

Comment: *Confessions of Judgment.* 102 Univ. of Pa. L. Rev. 524 (1954)

Conditioning of Relief From Unenforceable Judgment Upon Showing of Meritorious Defense To Claim Upon Which It Was Entered Can Deny Due Process. 64 Mich. L. Rev. 726 (1966)

Goodman, Note—*Full Faith and Credit—Due Process—Enforcement of Sister State's Cognovit Judgments.* 16 Wayne L. Rev. (1970)

Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit.* 29 Univ. of Chicago L. Rev. 111 (1961)

Hunter, *The Warrant of Attorney To Confess Judgment.* 8 Ohio St. L. J. 1 (1941)

Krauss, *A Clash in Ohio?: Cognovit Notes and the Business Ethic of the U.C.C.* 35 Univ. Cincinnati L. Rev. 470 (1966)

Laitos, *The Effect of Full Faith and Credit on Cognovit Judgments.* 42 Univ. of Colo. L. Rev. 173 (1970)

Leonard, *Confessions of Judgment: The Due Process Defects.* 43 Temple Law Q. 279 (1970)

Note: *Full Faith and Credit—Foreign Courts May Deny Full Faith and Credit to Cognovit Judgments and Must Do So When Entered Pursuant to an Unlimited Warrant of Attorney.* 54 Univ. of Va. L. Rev. 1970

Note: *Should a Cognovit Judgment Validly Entered in One State Be Recognized by a Sister State?* 30 Md. U. Law Rev. 350 (1970)

Schuchman, *Confession of Judgment as a Conflict of Laws Problem.* 4 Notre Dame Lawyer 46 (1961)

Toomepuu, Comment, *Cognovit Judgments and the Full Faith and Credit Clause,* 50 Boston Univ. L. Rev. 330 (1970)

(2) Resume of State Laws:

No pattern of State legislation may be found on the subject of confessions of judgment. Treatment varies from outright prohibition as a misdemeanor in Indiana, New Mexico and Rhode Island, to express statutory approval in Ohio, Illinois and Pennsylvania. In between are found silent tolerance and close regulation, with limitations on execution, and some prohibitions in small loans and consumer sales.

The tabulation below covers the situation as disclosed by research, though it appears much State legislation has been generated by this Court's decision in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and some revision may be required.

State	Status of Confession of Judgment	Statute
Alabama	—not permitted by contract before suit. —prohibited in small loans.	Ala. Code tit. 20, § 16 tit. 62, § 248 (1967)
Alaska	—not authorized, not prohibited.	Alaska Stat. § 09.30.050 (1962)
Arizona	—not permitted in small loans. —not authorized by contract before debt is due.	Ariz. Rev. Stat. § 6-629 § 44-143 (1956)
Arkansas	—authorized only upon personal appearance.	Ark. Stat. Ann. § 29-301 (1947)

State	Status of Confession of Judgment	Statute
California	—prohibited in conditional sales of motor vehicles, and retail instalment sales or small loans; otherwise authorized generally.	Cal. Civ. Code § 2983.7 (1968); § 1804.1 (1959); § 1132 (1965); Cal. Fin. Code § 18673; § 22407; § 24468; § 12318
Colorado	—prohibited in motor vehicle sales.	Colo. Rev. Stat. § 13-16-6 (1963)
Connecticut	—prohibited in small loans and instalment sales.	Conn. Gen. Stat. § 42-88; § 36-236
Delaware	—fully authorized, except for retail sales.	Del. Code Ann. tit. 10, § 3903; tit. 6-4311
Florida	—void if executed before action is brought. —prohibited in small loans.	Fla. Stat. § 55.05; § 516.16
Georgia	—permitted only after suit; prohibited in small loans.	Ga. Code, § 110-601; § 25-315
Hawaii	—prohibited on small loans and instalment sales; otherwise allowed on debts up to $1,000.	Hawaii Rev. Stat. tit. 34, § 633-3; tit. 22, § 409-15; tit. 26, § 416-13
Idaho	—prohibited on small loans only, otherwise authorized.	Idaho Code, § 26.2039; § 10-901
Illinois	—fully authorized.	Ill. Stat. Ann. Ch. 110, § 50
Indiana	—void if executed before cause of action accrued—use is misdemeanor.	Ind. Stat. § 2-2904; § 2-2906
Iowa	—permitted except on small loans.	Iowa Code, § 676.1-2; § 536.12
Kansas	—authorized on personal appearance in court.	Kan. Stat. § 61-105
Kentucky	—prohibited before action instituted. —prohibited in small loans and motor vehicle sales.	Ky. Rev. Stat. § 372.140 § 190.100

State	Status of Confession of Judgment	Statute
Louisiana	—prohibited before obligation comes due. —prohibited on small loans.	La. Const. Art. 7, § 4; La. Stat. § 6-585
Maine	—prohibited only on small loans and home repair contracts.	Me. Rev. Stat. tit. 9, § 3084, § 3724
Maryland	—prohibited in small loans, retail sales, otherwise authorized.	Md. Code, Art. 58A, § 19
Massachusetts	—generally prohibited.	Mass. Gen. Laws Ch. 231, § 13A
Michigan	—prohibited in retail sales or small loans. —authorized otherwise if on separate document.	Mich. Comp. L. § 445.864; § 493.12; § 600.2906
Minnesota	—prohibited in small loans and motor vehicle sales. —otherwise authorized.	Minn. Stat. § 56.12; § 168.71; § 548.22
Mississippi	—prohibited if executed before suit filed.	Miss. Code § 1545
Missouri	—fully authorized.	Mo. Stat. § 511.100
Montana	—authorized if made in person after suit filed, but void if providing for warrant of attorney.	Mont. Rev. Code § 93-9401; §13-811
Nebraska	—authorized by warrant of attorney, but not on personal loans by commercial lenders.	Neb. Rev. Stat. § 25-1312; § 8-823, § 8-447
Nevada	—authorized, except on small loans.	Nev. Rev. Stat. § 17.090, § 675.350
New Hampshire	—prohibited in small loan and motor vehicle sales.	N.H. Rev. Stat. § 361-A:7, § 399-A:5
New Jersey	—prohibited.	N. J. Stat. Ann. § 2A:16-9
New Mexico	—prohibited; use is a misdemeanor.	N.M. Stat. § 21-9-16; § 21-9-18
New York	—prohibited on instalment sales up to $1,500. and small loans and motor vehicle sales.	N.Y. Civ. Pr. L. & R. § 3201; Banking Law § 353; § 570 Personal Property Law § 302

State	Status of Confession of Judgment	Statute
North Carolina	—prohibited only on small loans.	No. Car. Gen. Stat. § 53-181
North Dakota	—prohibited on retail instalment sales.	N. Dak. Cent. Code § 51-13-02
Ohio	—fully authorized, but effective Sept. 16, 1970, instrument must contain warning of consequences.	Ohio Rev. Code § 2323.13
Oklahoma	—permitted, but not in consumer sales or loans.	Okla. Stat. tit. 12, § 689, § 690; tit. 14A, § 2-415, § 3-407
Oregon	—permitted, but not in motor vehicle sales, or debt consolidation contract.	Ore. R.S. § 26.110; § 83.070; § 697.733
Pennsylvania	—fully authorized.	Pa. Stat. tit. 12, § 739
Rhode Island	—prohibited on small loans; use is a misdemeanor.	R.I. Gen. Laws, § 19-25-24, § 19-25-36
South Carolina	—permitted, except on small loans.	S.C. Code, § 10-1535; § 8-800.13
South Dakota	—permitted.	S. Dak. Comp. L. § 21-26-1
Tennessee	—void if given before suit filed and process served.	Tenn. Code § 25-201
Texas	—void if given before suit filed.	Tex. Civ. Stat. Art. 2224
Utah	—permitted, except in consumer sales.	Utah Code, Ch. 18 (Uniform Commercial Credit Code)
Vermont	—prohibited in consumer contracts, otherwise permitted.	Vt. Stat. tit. 12, § 4671; tit. 9, § 2456
Virginia	—permitted, but not in small loans, specific attorney must be named in warrant to confess.	Va. Code § 8-355 et seq. § 6.1-284

State	Status of Confession of Judgment	Statute
Washington	—permitted, except on small loans.	Wash. Rev. Code § 4.60.050; § 31.08.150
West Virginia	—permitted, except on small loans.	W. Va. Code, § 56-4-48; § 7A-1
Wisconsin	—permitted, except on small loans.	Wis. Stat. § 270.69; § 214.14
Wyoming	—permitted only after suit and by personal appearance.	Wyo. Stat. § 1-309; § 1-312

In the District of Columbia there is no specific Congressional enactment on the subject, but a decision of the Supreme Court of that City (now the United States District Court), in a valuable and learned opinion by Mr. Justice Stafford, declined to enforce the terms of a cognovit note. That decision appears to represent the law of the District at this time. *Columbia Sand & Gravel Co.* v. *Stresbitt Tile Co.*, 56 Washington Law Reporter 82, 88 (1928).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 69-5

D. H. OVERMYER CO., INC., OF OHIO

and

D. H. OVERMYER CO., INC., OF KENTUCKY,

Petitioners

v.

FRICK COMPANY, A PENNSYLVANIA CORPORATION,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS, LUCAS COUNTY, OHIO

BRIEF FOR RESPONDENT

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